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BEFORE THE ARIZONA CORPORATION COMMISSION

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Chairman

Arizona Corporation Commission

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Commissioner

DEC 12 2002

AZ CORP COMMISSION
DOCUMENT CONTROLMARC SPITZER
CommissionerIN THE MATTER OF THE QWEST
CORPORATION'S COMPLIANCE WITH
SECTION 252(e) OF THE
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. RT-00000F-02-0271

RESPONSE IN OPPOSITION TO RUCO'S MOTION TO COMPEL

Qwest Corporation ("Qwest") hereby opposes the Residential Utility Consumer Office's ("RUCO") December 3, 2002 request for an order compelling disclosure of information subject to the attorney-client privilege. The information and documents sought in RUCO's requests are protected under well-founded principles of attorney-client privilege, will not reasonably lead to admissible evidence in this proceeding or other 271-related proceedings before the Arizona Corporation Commission ("Commission"), and do not fall under the crime-fraud exception to the privilege.

RUCO's Motion to Compel asks for responses to several data requests made in its Seventeenth and Eighteenth Set of Data Requests. Requests 17.1, 17.2, and 17.3 ask for the names of attorneys who recommended whether or not to file certain agreements with McLeodUSA ("McLeod"), and for the names of the attorneys that "drafted, negotiated, and approved the terms of the Agreement." Similarly, Requests 17.4, 17.5 and 17.6 ask for the same information regarding certain agreements with Echelon Telecom ("Echelon"). Qwest objected to these data requests on attorney-client privilege and work product grounds to the extent that they sought the identity of attorneys who "drafted," "approved," or "rendered decisions or recommendations regarding the agreements." It answered each question as to the identity of attorneys who negotiated the agreements by stating that, while attorneys for Qwest, attended settlement negotiations, they "were

1 not the negotiators of such agreements.”

2 Because the requests at issue in RUCO’s Eighteenth set were not objected to on attorney-
3 client privilege grounds, Qwest is unclear as to why RUCO has raised these responses in its Motion
4 to Compel production of certain information claimed to be protected under the attorney-client
5 privilege. Request 18.4 and 18.6 ask for information regarding McLeod Amendment No. 4 and
6 Eschelon Amendment No. 7, which were filed with the Commission. Qwest objected to this data
7 request on relevance grounds because the subject matter of this docket and the proposed 271 sub-
8 docket are agreements that were not filed rather than agreements that were filed. Request 18.7 asks
9 Qwest about agreements signed on November 15, 2000 with Eschelon. The Request asks whether
10 these agreements reflect different transactions and different parties. Qwest objected on relevance
11 grounds, and then responded that the parties to the agreements are Qwest and Eschelon as indicated
12 on the documents themselves and that the subject matter of each is clearly ascertainable by reading
13 the actual agreements.¹

14 In its Motion to Compel, RUCO further requests a minimum four-week extension for filing
15 testimony and the hearing date itself “to pursue further” depositions of attorneys for Qwest
16 regarding confidential communications with their client as well as confidential settlement
17 discussions between Qwest attorneys and attorneys from Eschelon and McLeodUSA. RUCO’s
18 requests are untimely and irrelevant, and would further delay without cause a Section 271 process
19 that has consumed four years of Commission, Staff, and the parties’ time and resources. On
20 November 7, 2002, the Commission issued an Order requiring that the Section 271 process be
21 delayed until resolution of issues in the 252(e) Docket.² As set forth in Qwest’s November 20, 2002
22 Motion to Reconsider, this determination is not in the public interest and will add upward of six
23

24 ¹ Because the Eighteenth Set of Data Requests relate to the same agreements referenced in the
25 Seventeenth Set, Qwest maintains its objections to those requests but does not directly address them
26 in this response regarding information protected under the attorney-client privilege.

² Qwest recognizes that it has asked the Commission to reconsider this determination, which
does not change the analysis here.

1 months to the Section 271 process, a process already complete in 12 of Qwest's 14 states. Further,
2 RUCO has had the opportunity to undertake discovery since June. RUCO's Seventeenth Set of
3 Data Requests were sent on October 29, 2002. Qwest responded November 8, 2002. RUCO did
4 not file its Motion to Compel until December 3, 2002, after Qwest had filed its testimony and
5 exhibits in this matter. It would be inappropriate to delay this proceeding in light of RUCO's
6 tardiness in undertaking this discovery and its tardiness in filing a motion to compel with respect to
7 its Seventeenth Set of Data Requests. RUCO's untimely and groundless requests will cause even
8 further delay in Qwest's Section 271 process, are not in the public interest, and should be denied.

9 **I.**

10 **ANY COMMUNICATIONS FROM QWEST ATTORNEYS TO QWEST ARE NOT**
11 **DISCOVERABLE.**

12 RUCO requests an order compelling Qwest to identify the attorneys involved in the
13 agreements at issue, the role those attorneys played in negotiating and executing the agreements,
14 and the attorneys' decisions, recommendations, reasons and explanations regarding those
15 agreements. RUCO does not claim that the communications at issue are not subject to the
16 attorney-client privilege. Rather, it argues that the communications are subject to the crime-
17 fraud exception to the privilege, discussed in more detail below, or that the actual identities of
18 the attorneys involved in the communications at issue are not subject to the attorney-client
19 privilege. RUCO's stated reasons for needing this information are: (1) to "ascertain non-privileged
20 communications such as conversations between Qwest's attorney's and McLeod's attorneys,"
21 and (2) use the information to explain "the discrepancy between what Qwest has publicly stated as
22 the reason for not filing the listed agreements, and what Qwest has told RUCO in discovery."
23 RUCO Motion to Compel at 5.

24 In effect, RUCO states that it needs the identity of these Qwest lawyers so that it can
25 question them during depositions concerning: (1) conversations between Qwest and CLEC
26

1 lawyers that occurred during the negotiation of certain settlement agreements,³ and (2)
2 conversations between Qwest attorneys and others at Qwest concerning the legal advice given by
3 these attorneys with respect to Qwest's § 252 filing obligations. Even if Qwest were to identify
4 its attorney as requested, there is nothing that RUCO can do with the information once provided.
5 The subject of the attorney's communications would fall under the attorney-client privilege or
6 would be wholly irrelevant to any issue in this docket and not calculated to lead to the discovery
7 of admissible evidence. Thus, its motion to compel serves no purpose and RUCO is not entitled
8 to the information it has requested.

9 The identity of an attorney is privileged when the identification itself is in substance an
10 acknowledgment of the confidential communication in the professional relationship between the
11 client and the attorney. See, e.g., Osterhoudt et. al. v. United States, 722 F.2d 591, 593 (9th Cir.
12 1983). As Qwest has stated in its objections to RUCO's Seventeenth Set of Data Requests,
13 identifying the names of attorneys "who's decision and/or recommendation it was to file or not
14 to file" certain agreements or which entity made decisions with respect to filing certain other
15 agreements assumes such a decision was made and articulated to the client. See RUCO Data
16 Requests 17.1, 17.2, 17.4, and 17.5 and Qwest's responses thereto. "[T]here may be
17 circumstances under which the identification of a client may amount to the prejudicial disclosure
18 of a confidential communication, as where the substance of a disclosure has already been
19 revealed but not its source." 772 F.2d at 594. The substance of the agreements has been
20 disclosed, but the source of (i.e. explanations for) any determination regarding filing or not filing
21 certain agreements sought by RUCO has not been revealed and is privileged.

22 Even if the identity of the attorneys involved in the agreements at issue did not reveal any
23 confidential professional communication between Qwest and its attorneys, the information
24

25 ³ As is discussed more fully on page 5, Qwest answered the only specific question asked by
26 RUCO about negotiations. RUCO asked what attorneys negotiated the agreements. Qwest
responded that no Qwest attorneys negotiated the agreements.

1 sought is not likely to lead to admissible evidence. See, e.g., Norwest Bank (Minn.) v.
2 Symington, 197 Ariz. 181, 185, 3 P.3d 1101, 1105 (App. 2000). Any and all of the attorney-
3 client communications regarding negotiation and execution of these agreements were between
4 Qwest and its attorneys in their official capacity to provide confidential legal advice. See, e.g.,
5 Southern Union Co. v. Southwest Gas Corp., 205 F.R.D. 542, 546 (D. Ariz. 2002) (setting forth
6 the essential elements for invoking the attorney-client privilege). Discussions between Qwest
7 and its counsel for the purpose of determining Qwest's obligations to file under the Act are
8 subject to attorney-client privilege. A.R.S. § 12-2234. ("To a civil action, an attorney shall not,
9 without consent of his client, be examined as to any communication made by the client to him, or
10 his advice given thereon in the course of professional employment.") As a result, even if RUCO
11 had the names of Qwest's attorneys, it could not depose them about discussions with their client.
12 Therefore, revealing the names of the Qwest attorneys involved in these agreements could not
13 reasonably lead to admissible evidence and would serve no purpose.⁴

14 RUCO also argues that it is entitled to the identity of attorneys who negotiated the
15 agreements with McLeod and Eschelon so that it can inquire into "non-privileged
16 communications such as conversations between Qwest's attorneys and McLeod's attorneys."
17 There are two defects in RUCO's argument. First, Qwest has answered the question asked by
18 RUCO; it told RUCO that Qwest attorneys did not negotiate the agreements with McLeod and
19 Eschelon. RUCO has asked no further questions and so there is no further answer to compel
20 with respect to which attorneys negotiated the agreements. Further, even if RUCO had asked
21 which Qwest attorneys had any type of discussions with CLEC counsel at these sessions, such
22 questions would not lead to the discovery of admissible evidence. Generally, the agreements
23

24 ⁴ That RUCO believes that the information it seeks is necessary "in explaining the discrepancy
25 between what Qwest has publicly stated as the reason for not filing the listed agreements, and
26 what Qwest has told RUCO in discovery" alone is not sufficient grounds to overcome the
privilege particularly when such inquiries have been and will continue to be made of other Qwest
personnel involved in these matters.

1 identified by RUCO in its Seventeenth and Eighteenth Set of Data Requests were made in an
2 attempt to compromise disputed claims between the parties.⁵ Evidence of statements made
3 during the negotiation of settlement agreements or compromises of disputes is inadmissible
4 under Rule 408 of the Arizona Rules of Evidence. Since these settlement negotiations are not
5 admissible, Qwest should not be required to produce information about the negotiations.

6
7 **II.**
8 **RUCO'S REQUESTS DO NOT FALL UNDER THE CRIME-FRAUD EXCEPTION OF**
9 **THE ATTORNEY-CLIENT PRIVILEGE.**

10 In fact, in its Motion to Compel, RUCO recognizes that the information it seeks is
11 covered under the attorney-client privilege, but relies on the crime-fraud exception to the
12 privilege as its basis for requesting disclosure of Qwest's attorney communications. According
13 to RUCO, the exception applies because "RUCO has met its burden of establishing a prima facie
14 case of fraud in its filing of August 29, 2002." RUCO's reliance on Arizona's crime-fraud
15 exception is erroneous. Moreover, RUCO has failed to make a prima facie showing of fraud in
16 this matter.

17 RUCO correctly states that the crime-fraud exception to the attorney-client privilege is
18 recognized for civil matters in Arizona. RUCO, however, fails to demonstrate the presence of
19 the key element necessary for its application. In order to apply the crime-fraud exception, there
20 must be a prima facie showing by RUCO that the attorneys at Qwest were "retained by the client

21 ⁵ In addition to the settlement agreements and amendments to the settlement agreements listed
22 by RUCO in its data requests, RUCO seeks information about the identity of attorneys involved
23 in the negotiations of interconnection agreements and amendments that were filed with the
24 Commission for approval and for purchase agreements that were not filed. With respect to the
25 filed interconnection agreements and amendments, discussions between counsel about those
26 agreements are not relevant or calculated to lead to the discovery of admissible evidence because
this proceeding is about agreements that were not filed, not agreements that were filed.
Similarly, the purchase agreements are not agreements that implicate Qwest's obligations under
§ 251 (b) and (c) of the 1996 Telecommunications Act and are not properly a part of this
proceeding.

1 for the express purpose of promoting intended or continuing criminal or fraudulent activity.”
2 State v. Fodor, 179 Ariz. 442, 450, 880 P.2d 662, 670 (App. 1994) (emphasis added). If
3 attorneys for Qwest were, in fact, employed in the negotiation and execution of the agreements
4 identified by RUCO, there is absolutely no evidence that Qwest retained those attorneys for the
5 express purpose of promoting or continuing criminal or fraudulent activity. RUCO makes the
6 conclusory allegation that Qwest, Eschelon and McLeod were somehow involved in a conspiracy
7 to defraud the Commission and the public. This is not sufficient to support a threshold finding of
8 the attorney “fraud” that is required to destroy the attorney-client privilege. Id.

9 In its August 29, 2002 comments, RUCO proffers its theories behind the negotiation and
10 execution of the agreements at issue. Contained in those comments is but a veiled reference to
11 the possible involvement of one Qwest attorney in the events described in RUCO’s allegations.
12 In footnote 7 of RUCO’s August 29 report, RUCO states:

13
14 The draft [of an interconnection agreement amendment with
15 McLeod] apparently was attached to an email from a sender
16 identified as “RR.” The e-mail does not identify the recipient;
17 although a note in the body of the document addresses “Jim” on
18 page 2, paragraph 1.8.2 (Id.) RR might refer to a McLeod attorney,
19 Randy Rings. “Jim” might mean Jim Gallegos, a Qwest attorney.
[Audrey] McKenney [Qwest’s Senior Vice President of Wholesale
20 Markets Business Development] identified Gallegos and Rings as
21 attorneys who participated in contract discussions.

22 RUCO Report at 9 (emphasis added). The footnote relates to a draft amendment to the
23 McLeod/Qwest interconnection agreement. RUCO’s comments regarding the draft amendment
24 conclude by stating, “further investigation is necessary to determine the context, author and
25 recipient of the draft.” Id.

26 RUCO’s identification of these individuals based on the information in one corporate
communication is speculative at best. This speculation could not be construed as “evidence” of

1 Qwest's attorney(s) involvement in the communication, much less as evidence of attorneys being
2 retained for the express purpose of promoting intended fraud. Second, to establish any claim of
3 common law fraud in Arizona, RUCO must demonstrate the existence of nine elements: (1) a
4 representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or
5 ignorance of its truth; (5) the intent that it should be acted upon by and in a manner reasonably
6 contemplated; (6) the hearer's ignorance of its falsity; (7) reliance on the truth; (8) the right to
7 rely thereon; and (9) the hearer's consequent and proximate injury. See, e.g., Peery v. Hansen,
8 120 Ariz. 266, 269, 585 P.2d 574, 577 (App. 1978)("To establish an actionable claim of fraud,
9 there must be a concurrence of all nine elements thereof.").⁶ RUCO has not presented evidence
10 to support any of the required elements of fraud. It certainly has not shown or even introduced
11 evidence that Qwest attorneys undertook representation of the company for the express purpose
12 of defrauding the Commission and the public.

13 **III.**
14 **RUCO'S REQUEST IS NOT TIMELY, AND ITS REQUEST FOR AN EXTENSION OF**
15 **TIME SHOULD BE DENIED.**

16 RUCO's request for an extension is untimely (as is its Motion to Compel) and should be
17 denied. RUCO states that it needs additional time in order to conduct more discovery and
18 depositions on the requested information. See Motion to Compel at 2. As set forth above, there
19 is no evidentiary basis to conduct depositions of Qwest's attorneys.

20 In its August 29, 2002 report to the Commission, RUCO raised the issue of further
21 investigation needed to identify the authors and recipients of the email regarding the Mcleod

22 ⁶ RUCO mistakenly relies on Pearce v. Stone, 149 Ariz. 567, 572-73 720 P.2d 542, 548-49 (App.
23 1986) to support its theory that the evidence presented by it and the Minnesota PUC Report
24 "viewed in [their] totality" constitute a prima facie showing of fraud. In Pearce, however, the
25 issue was a fraudulent conveyance, which requires a different finding than common law fraud.
26 Id. at 571, 720 P.2d at 546. A prima facie showing of fraudulent conveyance requires only: (1) a
conveyance; (2) an agreement between two or more people to effect the fraudulent conveyance;
(3) damages resulting from the conveyance that are traceable to the conspiracy; and (4) a lack of
adequate remedies elsewhere. Id.

1 draft amendment – the only reference to possible attorney involvement in the report.⁷ See Aug.
2 29, 2002 Report at 9. That was over three months ago. RUCO now asks the Commission to
3 compel production of the information to clarify its story of August 29, 2002, and charges Qwest
4 for the “delay caused in having to file this motion” that “will make it impossible to meet the
5 timetables established in the Commission’s Procedural Order of November 7, 2002.” Motion to
6 Compel at 2. If RUCO knew in August about information it needed, but did not request until
7 October 29, 2002, it should not be permitted more time to file its testimony and to further
8 postpone a hearing on Section 252 matters. Qwest continues to emphasize the length of the
9 Section 271 docket, particularly in light of the November 7, 2002 Procedural Order, requiring
10 that the 252 investigation be complete before finalizing the public interest phase of the 271
11 docket. RUCO’s request is yet another delay that is grounded on specious requests for
12 information protected by the attorney-client privilege.

13 In addition, RUCO issued its Seventeenth Set of Data Requests on October 29, 2002.
14 Qwest timely answered those requests on November 8, 2002. RUCO sent its Eighteenth Set of
15 Data Requests on November 15, 2002, to which Qwest timely responded on November 25, 2002.
16 The bulk of the information sought by RUCO in its Motion to Compel relates to its Seventeenth
17 Set of Data Requests. RUCO knew on November 8th that Qwest objected to the requests based
18 on the attorney-client privilege. It is now just bringing the issue to this Commission’s attention.
19 Further, at the time RUCO issued its Eighteenth Set of Data Requests, the Commission had
20 already proposed its procedural schedule for resolution of Section 252 matters, including the
21 requirement that RUCO and intervenors file direct testimony by January 3, 2002. Even if the
22 information provided by Qwest on November 8, 2002 were to serve as the gravamen for
23 postponing all further proceedings in this docket, RUCO should have raised the issue previously
24

25 ⁷ RUCO also estimated the time necessary for completing its investigations as 90 days from its
26 August 29, 2002 filing, which would have been Nov. 27, 2002. See RUCO’s August 29, 2002
Comments at 3.

1 and prior to Qwest filing over a thousand pages of direct testimony and exhibits on December 2,
2 2002, as required by the November 7 Procedural Order.

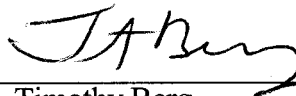
3 RUCO has conducted extensive discovery about the circumstances surrounding the
4 agreements at issue in the 252 docket. It has had months to develop a record in this proceeding,
5 which has resulted in thousands of pages of documents, including all documents produced in
6 response to the hundreds of information requests served by the Minnesota Attorney General. A
7 hearing in the 252 docket is scheduled to begin on January 29, 2002 or as soon thereafter as is
8 practical. During the testimony phase and throughout this proceeding (as well as any
9 proceedings related to the 271 sub-docket once finalized), RUCO will have ample time to
10 conduct more discovery, as well as examine and cross-examine witnesses for Qwest. At this
11 juncture more delay tactics on the part of RUCO is prejudicial and unfounded.

12 WHEREFORE, Qwest respectfully requests that RUCO's Motion to Compel and request
13 for an extension be denied.

14 DATED this 12th day of December, 2002.

15 FENNEMORE CRAIG, P.C.

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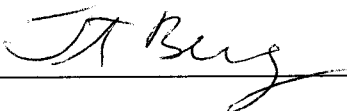
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